NO. 2596.

In the United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST COMPANY, a Corporation,
Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
Appellees.

REPLY BRIEF OF APPELLANT.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE.

SHACKLEFORD & BAYLESS,
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Appellant cannot accept the statements found on pages 1-5 of appellee's brief. Appellant does not claim that it has the fee title to the tract of tide lands in dispute, nor has it ever claimed title by adverse possession against the United States. We do claim that we are entitled to the possession as against appellee and all the world, and that our right to that possession can not be taken away, except, perhaps, by Congress or by the State which may in the future be erected out of the Territory of Alaska. Whether our right of possession or our right to purchase the tract when Congress shall provide the terms upon which we may acquire title as

set forth in the said Act of May 17, 1884, can be taken away is not a matter entering into the consideration of this case. The question is, what are our present rights?

Nor, as appellee contends, does our right to possession depend on our having maintained actual foot possession of the tract in question *at all times since May 17, 1884*. The Act itself (Sec. 8) is clear and unambiguous and needs no construction. Appellee attempts to inject into the act words that are not there and attempts to add a proviso to the Section, which was excluded by Congress; he seeks judicial legislation, and this, too, after the Court has several times, as shown by the cases cited in our opening brief, expressly construed the Statute and refused to so legislate.

The Statute provides, that

> "* * * persons shall not be disturbed in the possession of any lands actually in their use or occupation or *now* claimed by them; but the *terms* under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Assume, for the sake of argument, that the lower court was correct in holding that the word "or" in the section should be construed to mean "and". The word "now" in the Section clearly means May 17, 1884, the date of the passage of the Act. It cannot mean 1890, or 1895, or 1900 or 1913. "Now" means, at the *present time* (May 17, 1884) and cannot be distorted to mean sometime in the future. This being true, is the appellant a person falling within the Stat-

ute? In other words was the appellant, on May 17, 1884, in the use or occupation of the tide lands in dispute, claiming the same? There can be no doubt that this question must be answered in the affirmative. The memorandum decision of the lower Court so holds and the undisputed evidence so shows; the brief of appellee can not question it seriously for the evidence shows that from 1882 until 1895 the 113 feet was being *actually used* by appellant in the landing and mooring of vessels and that it *was necessary for that purpose,* the lower Court holding that the entire 600 feet of original location (p. 24 Record) was "a necessary adjunct to the use and enjoyment of the wharf as a landing place for such vessels as were operated by plaintiff" (appellant). Regardless of what may have happened since 1895, when appellant commenced to land vessels at the upper wharf, the statute has been fully met and appellant is entitled to the possession of the 113 feet, at least until Congress otherwise provides. We think it is clear that the rights and privileges recognized by the act of 1884 were vested rights, not merely inchoate, and this is the construction placed on the Act by the cases cited in our first brief; so that *when* Congress prescribes the *terms* we may acquire the title by complying therewith because we have earned the title by reason of our occupying and claiming the land at the time the Act of 1884 was passed. We have earned it as much as a homesteader who has fully complied with the public land laws has earned the title

to his homestead. We have the right to the possession in the meantime, but our opportunity to acquire title is merely deferred until there shall be "future legislation by Congress."

The question of non-user is therefore immaterial; our right to acquire title (when Congress permits) does not depend on constant use or upon improvements, as shown above. Appellant has earned the right to purchase (when Congress legislates) and it merely seeks to be protected in its right; this right to purchase is valueless unless we have the right to use and occupy after purchase, and if the Court holds we have lost our right to occupy then the right to purchase would be the mere shadow without the substance. The lower Court in its decision (p 27 Record) says:

> "In 1884 the plaintiff had use, occupation and claim of the tide land in controversy,"

But holds that the plaintiff by non-use of the 113 feet abandoned the same. Even if the question of abandonment may properly be considered in this case, yet it has been shown in our first brief that there has been no abandonment.

We fail to see any basis for appellee's claim (page 5 Record) that appellant's only rights were littoral rights of an abutting upland owner. The decision of the lower Court (p. 24 *et seq* Record) holds otherwise (See above quotation from the decision). Appellant has such littoral rights and it has not lost the same, as we shall hereafter point out.

On pages 10 to 15 inclusive of appellee's brief is a statement of what he claims to be the established facts. It would not be useful to discuss each of the 23 paragraphs thereof but we point out that many of the alleged facts are not facts at all but unfounded conclusions of law. We again call the Court's attention to the statement of the facts as set forth in our original brief and to the testimony there referred to. The facts are practically undisputed. It was in the fall of 1883 that Murray defined the boundaries by driving piles (Record, p. 88 et seq, Ex. 19; p. 677 of Record) below high tide on the north and south boundary line of the tract. These piles were driven not only to mark the boundary but also for the purpose of mooring vessels to (Id.) and vessels of plaintiff were actually moored to them (Id.). (Deposition of Capt. Lloyd, Record p. 785 et seq and map attached to his deposition; also deposition of Capt. Hunter, Record p. 722.) Said Ex. 19 (p. 677) shows the location of the south pile to be on the south line of the wharf site and between high and low water mark, on the very 113 feet now claimed by appellee. That this 113 feet was in actual use by plaintiff in the landing of vessels from 1883 down to 1896 is incontrovertible. The wharf was completed in the year 1882. (Ev. Dautrick pp. 87 and 88 Record) and was continuously used till 1896. Murray sold the property and the appellant succeeded to all his rights. It is evident from all the evidence that the wharf and the said boundary piles were constructed

and driven by Murray, to all of whose rights appellant has succeeded. Appellee is mistaken in saying that no improvements were placed on the 113 feet prior to 1900. The pile driven thereon was certainly an improvement, and its use in mooring vessels, as shown clearly constituted a use and occupancy and possession contemplated by the Act of 1884. It was the very use to which the land was most susceptible in those early days, and such use was *necessary*. (Testimony supra.)

Every deed and every plat shows the claim of possession and of title down to low water mark as defined in Murray's original location and claim. The evidence also shows that whatever possession appellee ever had was permissive only and not held under such circumstances as to call upon appellant to order him off until 1913 when he started to make such improvements as would indicate an intention to claim adversely. His use was not exclusive for whenever occasion required appellant occupied and used, through its tenants, this 113 feet without objection from appellee, though with his express knowledge (Tes. Dautrick and Messerschmidt). In a new country like Alaska people are generous in helping others and it is not strange that appellant allowed appellee to use this 113 feet to facilitate his business; that generosity the appellee is attempting to abuse in which he should not be aided by a court of equity. If appellee removed boulders from the 113 feet it was for his own purposes to which appellant did not object. If this land had been inclosed

upland and a person entered thereon and put up improvements the law would require the owner to act more promptly than with reference to tide land in a sparsely settled community where the use to which appellee put the tideland did not interfere with the present purposes of appellant.

That the appellant has paid taxes on the whole 600 foot tract, including the 113 feet is clear, from the testimony of Dautrick (transcript p. 342-356), and Ewing (p. 361 et seq). If taxes were not paid prior to 1901 it was because the property was not taxed. On all these questions see also the testimony of Swan, record pp. 263 et seq. Paragraphs 20 and 21 on page 15 of appellee's brief we shall refer to later.

Appellee takes up pages 30 to 39 of its brief discussing appellant's brief. It will suffice to say that we think the brief will bear the closest scrutiny of the Court. Appellee in paragraphs (1), (2) and (3) of his brief, states what to him seems to be appellant's position, but appellant's position is not at all as there stated; for we claim to have been in actual possession of the whole 600 foot tract, including the 113 feet, on May 17, 1884, and that such possession was maintained up to July, 1905, but that since that time we have not actually been in foot possession of the 113 feet except by using, occupying, claiming and exercising dominion over the entire property.

We shall now briefly discuss the "Points" of Appellee's brief, in their order:

Point 1: Appellant has never claimed to own the fee to the tide land in question, although it is the well established law ever since the case of *Shively vs. Bowlby,* 152 U. S. 1, and *Mann vs. Tacoma Land Company,* 153 U. S. 273, that the United States has full and ample authority to grant a fee in tide land. See also *Jones vs. Callvert,* 32 Wash. 610. Notwithstanding this power it has not seen fit to convey tide land generally but to retain title for the future states. This Court and the District Court have frequently held that the act of 1884 applied to tide lands. See:

Carroll vs. Price, 81 Fed. 137.
Hecksman vs. Sutter, 119 Fed. 83, 128 Fed. 393.
McCloskey vs. Pacific Coast Co., 160 Fed. 794.

But we have not contended that the general public land laws, if made applicable to Alaska, would cover tide lands, but when Congress prescribes the terms of acquiring title to the tide lands in question (as set forth in the Act of 1884) then the person who was in the use and occupation thereof and claiming the same on May 17, 1884, will have the right to acquire the title. Congress may never prescribe the terms, but may retain title so that the same shall pass to the future state of Alaska, but that is mere speculation with which this case is not concerned.

Point 2: As we understand the ruling of the lower Court, it was not held that the person who used, occupied and claimed the tide land on May 17, 1884, must remain in the actual foot possession up to the

time he is permitted to acquire the title, but only held that if the use, occupancy and claim had and made on May 17, 1884 *was abandoned,* then the possession of the tide lands so abandoned might be taken by others. But it must be remembered that *mere non-user or failure to occupy is not abandonment.* The appellant has never abandoned; on the contrary it has consistently claimed the right of possession and has exercised that right whenever occasion required, for instance, prior to 1895 it actually used and occupied the 113 feet; since 1895, it has leased it and let it to tenants; it has looked after it as it has its other property; it instructed its agents to keep squatters off it; it has paid taxes on it regularly to the present moment; it has intended and still does intend to construct a wharf covering it entirely; it has exercised dominion, control and ownership over it at all times and conveyed certain rights therein. Surely it will not be held to have abandoned it when it has been shown that the whole 600 feet (which includes the 113 feet) are necessary to construct a public wharf to meet the needs of the public at Juneau. We are confident that a reading of the entire record will not induce a holding of abandonment, but the contrary thereof. See cases in our first brief.

Nor can we agree with appellee in his claim that foot possession must be maintained at all times, such a claim is in the very teeth of the statute. In no case having facts similar to those here has any court held, so far as we have been able to find, the law to be such

as to debar the appellant from its right of possession to the 113 feet; but the holding has been in favor of appellant. See cases cited in our first brief. The cases cited under point 2 of appellee's brief are not persuasive; what the Court said had reference to the facts in those cases, in all of which the actual possession had been maintained. Those cases do not militate against appellant.

Point 3: The evidence shows both that Murray and appellant entered upon the 600 foot tract; that the wharf was completed in 1882 and the mooring and boundary piles driven in 1883; that appellant has succeeded to all Murray's rights; that what appellant now claims is the identical tide lands described in Murray's location, that was built upon and defined by boundary stakes. The lower Court had no difficulty in deciding this point in appellant's favor. See maps and deeds in evidence and the testimony of all the witnesses.

The wharf was built in the very center of the 600 foot site for the good reason that 300 feet was necessary on each side of the center of the wharf for the proper and safe landing of vessels.

In *Nicomen Boom Co. vs. North Shore Boom & Driving Co.*, 40 Wash. 325, 82 Pacific 412, an appropriation was made of more land than was actually necessary for the present use and having in mind the future demands of the business. A claim of abandonment was made because this surplus land was not used. The Supreme Court in passing on this point said:

> "If there was an abandonment, it must have been by virtue of non-use of the territory, in the way of failure to extend and operate the boom thereon. However in the absence of legislative provision to that effect, mere non-user does not of itself constitute an abandonment. It is held that, without such legislative provision, courts are not justified in fixing a limit at which mere failure to construct shall be held to be an abandonment. Abandonment is a question of intent, and while such intent may be found as a fact from long non-use, yet the non-use itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights."

Many authorities are there cited which hold that a claimant has a right to appropriate land sufficient to meet the future demands of his business and failure to use all of such land will not constitute abandonment.

The evidence in the case at bar conclusively shows that the appellant at all times has been holding this property for its future use, and now that the time for such use has arrived has already drawn the plans and stands in readiness to construct a dock on the whole of the property.

We have not claimed that the vessels themselves occupied any part of the 113 feet. The reason is obvious. Large deep sea vessels could not land above low tide; but the 113 feet above low tide were used in holding the vessels to the wharf and in preventing them from being damaged and in making it possible to unload them. This was actual occupancy of the 113 foot strip; possibly it was also the exercise of a littoral right.

Messerschmidt actually used the 113 feet in his operations under his lease. The evidence is clear on this point.

The lease to Davidson does say that appellant owned upland in front of which the leased land lay; that was literally true for it owned the fee to the upland; but that was not all the lease recited. It also said that all structures placed on the tide lands should become the property of appellant and should be yielded up to it, on the expiration of the lease, thus showing appellant's claim of possession and ownership. It also recites that Davidson obtained permission from appellant to enter upon the tide lands. There is nothing in the lease to show that appellant did not claim possession under the Act of 1884—in fact just the opposite appears.

The following cases, viz:

Delancy vs. Piepgrass, 33 N. E. 822, 827;
Seabrook vs. Coos Bay Ice Co., 89 Pac. 417;
Montgomery vs. Shaver, 66 Pac. 923,

cited under Point 3 by appellee, are not in point, as they deal with the question of the fee and are disassociated with any statute.

Under the rule in *1 Cyc.* 984, cited by appellee, the appellant has maintained sufficient possession.

Point 4: As to this it is sufficient to say that appellant does not claim title by reason of adverse possession under color of title, and what is said on pages 65 to 73 has no application.

Point 5: Under appellee's citations in his discussion of this point, appellant never abandoned; there was never any intention to abandon, the purpose always being to use and to construct the new wharf. This question of abandonment has been elsewhere herein discussed.

Point 6: The general statement that unoccupied and unappropriated public tide land may be taken possession of and that only the Government may complain may be a correct general statement of the law, but the facts in this case do not bring it within the principle.

Point 7: We never claimed the ownership of upland gives title to the tide land bordering thereon; but we agree with appellee's numerous statements in his brief to the effect that such upland ownership gives him the right of ingress and egress to and from his upland, over the tide land and out to deep water, and that such right is one that will be amply protected by the Courts. This is primary law and admitted by appellee; this brings us to a brief discussion of

Point 8: Frequent expressions are found in appellee's brief to the effect that the appellant "deeded" to the City of Juneau for street purposes a strip of upland bordering the line of high tide. This statement we most emphatically deny. There is not a scintilla of evidence to justify or excuse such a statement. It is apparent that this statement is made to make the facts in his case appear to be in conformity with those in

the case of *McCloskey vs. Pacific Coast Company.* Appellee points to Exhibit C (Record pages 716 to 720) to substantiate his statement. Exhibit C is merely a town plat and dedication of streets thereon; it is not a *deed,* as was given in the McCloskey case, supra; nor a *conveyance;* it does not convey the *fee* in the street to the town of Juneau, as was done in *McCloskey vs. Pacific Coast Company,* but merely grants an easement for the public to use the street for street purposes, that is for the purpose of passage. The fee in the street is still retained by the appellant and the appellant, notwithstanding the dedication, is still the owner of the upland upon which the 113 feet of tide lands abut.

The rule is thus stated in 13 *Cyc.* 486—Note 74:

> "Where the owner of property makes a common law dedication the ultimate fee remains unaffected thereby. The effect of the common law dedication is not to deprive a party of title to his land but to estop him while the dedication continues in force from asserting that right of exclusive possession and enjoyment which the owner of property has." (Citing numerous authorities.)

In *Perley vs Chandler,* 4 Am. Decisions 159 (Mass.), the rule is thus stated:

> "By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may

be derived from it, consistently with the continuance of the easement, the owner can lawfully claim."

See also:

Rowe vs. James, 71 Wash. 267, 128 Pac. 539;
Holm vs. Montgomery, 62 Wash. 398, 113 Pac. 1115;
Bradley vs. Spokane & Inland R. R. Co., 79 Wash. 455, 140 Pac. 688;
Meir vs. Portland Cable Ry. Co., 16 Oregon 500, 19 Pac. 610.

It is plain that if this street is ever abandoned in the future then the use of the property returns to the appellant if it is still the owner of the abutting property. Whatever rights the appellant ever had, as fee owner, including the rights of undisturbed access to the water, it still possesses, subject only to the burden of having its property used for street purposes. If the appellee is permitted to use these tide lands for permanent wharf structures then the appellant merely by giving an easement for road purposes to the public must be held to have given to the appellee, a private person, the exclusive right to usurp and use the appellant's littoral rights by building a wharf. If the road is abandoned then instead of receiving the street property back free from the easement granted the appellant will find that his valuable littoral rights are in possession not of the public but of a third party who, if permitted to remain, will no doubt claim a right thereto by virtue of continued possession.

In the State of Washington the Statute of 1890 gave the upland owner the preference right to purchase from the State the abutting tide land. In the case of *Gifford vs. Horton,* 54 Wash. 595, 103 Pacific 988, the Supreme Court of Washington held that where an owner of property abutting on tide lands dedicated a street which abutted on the land side of the tide land and skirted the water edge of the upland, then the grantees of the dedicator still owned the fee of the street and as such owners were the "upland owners" who were entitled to the preference right to purchase the tide lands in question. Many cases from different states are there cited in support of this ruling.

So it clearly appears that all of appellant's littoral rights arising out of upland ownership are still intact and furnish in themselves, and without reference to the Act of 1884, ample ground for a decision of this case in favor of the appellant.

The facts in the McCloskey case cited by counsel differ from those in the case at bar; there an absolute deed was given to the city to the street property, therefore the fee to the street passed to the city. In this case there was no such deed. This property was dedicated. That case was based upon different facts and can only be an authority in a case with similar facts. That case does, however, squarely decide that persons claiming or in possession of tide land properties under the Act of 1884 could not be ousted from them. These are the facts and exactly our contention in the case at

bar. As was shown heretofore the appellant herein was in possession of the tide lands now being claimed by the appellee and therefore under authority of *McCloskey vs. Pacific Coast Co.,* 160 Fed. p. 801, is now entitled to the land in question. This in reality was the final decision of the McCloskey case and not mere obiter as was the point contended for by appellee.

We here call attention to the fact that the McCloskey case was decided in 1908 and that the dedication in the case at bar was not made until 1913.

Point 9: It is a bare assumption on appellee's part to claim that appellant has lost its right either by the abandonment under the Act of 1884 or by conveyance of the upland.

Point 10: Appellee claims that because appellant prior to the commencement of this action gave the following instruments, to-wit:

1. Contract for deed to Messerschmidt covering Lot 14 in Block 1, of Pacific Coast Addition. (Ex. 24, p. 693, Record);

2. Contract for deed to Gemmett covering Lot 2 in Block 3, same Addition (Ex. 26, p. 699, Record);

3. Contract for deed to Gemmett covering Lots 3 and 4 in Block 3, same Addition (Ex. 27, p. 704, Record);

4. Quit claim deed to Messerschmidt covering Lot 15 in Block 1, same Addition (Defts. Ex. B, p. 713, Record),

it is not a proper party to maintain this suit.

Page 804 of the record is a plat of The Pacific Coast Addition. By glancing at it one will observe that there is a strip of tide land lying between lots 13, 14 and 15, in Block 1, and the low tide line. To this strip the appellant has never given any contracts or conveyances. That fact alone is a sufficient answer to appellee's contention.

It will also be noticed that appellant still has the legal title to Lots 2, 3 and 4 in Block 3, in front of and abutting on which the 113 feet of tide lands lie.

Lot 13 in Block 1 (to which appellee claims the right of possession), has never been conveyed or contracted to be sold by appellant.

Appellee claims the right of possession to all of Lots 13 and 14 and the south 13 feet of Lot 15, in Block 1, together with the right of possession of all tide lands in front of the same out to deep water.

The said contracts and deed also each provides that the Pacific Coast Company, appellant, reserves all littoral, riparian and tide land rights so the rights it is now claiming have not been parted with. Moreover if the reservation had not been made it would still have such an interest as to enable it to maintain the suit for the benefit of those holding under it. However, as stated it has never parted with any interest in the largest portion of the tide lands claimed by appellant.

It is submitted that the decree should be reversed.

Respectfully,

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